

STATE OF KANSAS
BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the
Proposed Adoption of Permanent Kansas Administrative Regulations
Proposed new regulation K.A.R. 28-19-325

REPORT OF THE HEARING OFFICER

This matter comes before David B. Stutt, hearing officer appointed by the Secretary of the Kansas Department of Health and Environment (KDHE) to consider the comments of the public regarding the adoption of a proposed permanent administrative regulation.

INTRODUCTION

Pursuant to K.S.A. 2009 Supp. 77-421, as amended by L. 2010, ch. 95, sec. 9, notice of the public comment period and public hearing was published in the *Kansas Register* on August 26, 2010. A copy of the public notice is included in this report as Attachment 1. The public hearing was conducted at Topeka, KS on October 26, 2010 in Room 530 of the Curtis State Office Building. This regulation is promulgated under the authority of K.S.A. 65-3001 *et seq.* The purpose of this regulation is to implement the Compressed Air Energy Storage Act (CAES Act).

Attachment 2 is a sign-in sheet listing persons present at the public hearing.

SUMMARY OF THE RECORD

The hearing officer opened the public hearing at 11:05 AM with introductory remarks and called upon Bureau of Air staff member, Mr. Miles Stotts, to briefly review and discuss the proposed regulation (Attachment 3). Following these remarks the hearing officer invited public comment. No comment was presented or received from any person from the public during the hearing.

During the public comment period, KDHE received no comment letters or electronic mail comments from the general public. Raney Gilliland, Assistant Director, Kansas Legislative Research Department, submitted a comment letter on behalf of the Joint Committee on Administrative Rules and Regulations. The letter is included in this report as Attachment 4. No other comments were received during the public comment period.

POST-HEARING ACTIVITIES

Following the close of the public comment period, all comments received were fully considered. The agency's response to the public comments is detailed in the agency's responsiveness summary, which is included in this report as Attachment 5.

RECOMMENDATIONS

On the basis of the administrative record developed in this matter, the hearing officer finds and concludes that agency staff has met the public participation requirements for adopting the proposed regulation.


FINDINGS OF FACT

1. K.S.A. 65-3001 *et seq.* authorizes the Secretary of the Kansas Department of Health and Environment to adopt and amend administrative rules and regulations related to the Kansas air quality program.
2. Pursuant to this authority, the Secretary promulgated the compressed air energy storage regulation at issue, made a statement of the environmental benefit and economic impact of the proposed regulation and published notice of the public comment period and hearing in the *Kansas Register* on August 26, 2010.
3. The public comment period that was established for receiving comments on the adoption of the proposed regulation was concluded and the public hearing was held on October 26, 2010.
4. Comments related to the adoption of the proposed regulation were received and all comments have been fully considered. Changes in the proposed regulation were not needed to address these comments.

CONCLUSIONS

The hearing officer concludes that the Secretary of the Kansas Department of Health and Environment has the authority to promulgate the proposed regulation under K.S.A. 65-3001 *et seq.* and has met the requirements established under K.S.A. 2009 Supp. 77-415 *et seq.*, as amended by L. 2010, ch. 95, for adopting regulations and filing these regulations with the Kansas Secretary of State.

Dated this 2nd day of November, 2010.



David B. Stutt
Hearing Officer

Attachment 1

Pittsburg State University — Bid postings: www.pittstate.edu/office/purchasing. Additional contact info: Phone 620-235-4169, fax 620-235-4166, e-mail jensch@pittstate.edu. Mailing address: Pittsburg State University, Purchasing Office, 1701 S. Broadway, Pittsburg, KS 66762-7549.

University of Kansas — Electronic bid postings: <http://www.purchasing.ku.edu/>. Paper bid postings and mailing address: KU Purchasing Services, 1246 W. Campus Road, Room 7, Lawrence, KS 66045. Additional contact info: Phone 785-864-5971, fax 785-864-3454, e-mail purchasing@ku.edu.

University of Kansas Medical Center — Bid postings: <http://www2.kumc.edu/finance/purchasing/bids.html>. Additional contact info: Phone 913-588-1100, fax 913-588-1102. Mailing address: University of Kansas Medical Center; Purchasing Department, Mail Stop 2034; 3901 Rainbow Blvd., Kansas City, KS 66160.

Wichita State University — Bid Postings: www.wichita.edu/purchasing. Additional contact info: Phone 316-978-3030, fax 316-978-3528. Mailing address: Wichita State University, Office of Purchasing, 1845 Fairmount Ave., Campus Box 12, Wichita, KS 67260-0012.

Barry Swanson
Chair of Regents Purchasing Group
Director of Purchasing
and Strategic Sourcing
University of Kansas

Doc. No. 038494

State of Kansas

Department of Health and Environment

Notice of Hearing on Proposed Administrative Regulations

The Kansas Department of Health and Environment, Division of Environment, Bureau of Air, will conduct a public hearing at 11 a.m. Tuesday, October 26, in Room 530 of the Curtis State Office Building, 1000 S.W. Jackson, Topeka, to consider the adoption of proposed new air quality regulation **K.A.R. 28-19-325**, regarding compressed air energy storage. A summary of the proposed regulation and the estimated economic impact follows:

Summary of Regulation:

The Compressed Air Energy Storage Act (CAES Act) was enacted by the 2009 Kansas Legislature at K.S.A. 66-1272 through 66-1279. Specifically, K.S.A. 66-1275 requires KDHE to create rules and regulations establishing requirements, procedures and standards for the monitoring of air emissions from compressed air energy storage (CAES) wells and storage facilities within 18 months after the effective date of the CAES Act.

Economic Impact:

Currently, there are no existing CAES facilities in Kansas and the capital cost of a CAES facility is not taken into consideration for this analysis. Only estimated costs to comply with the proposed regulation are considered. It is unknown if emissions controls will be necessary, as there is no prior experience with CAES emissions from which to draw information. Accordingly, there is no estimate of emissions control costs at this time. Initial compliance costs incurred by the owner or operator of a CAES

facility may vary between \$28,400 and \$118,400, with annual compliance costs varying from \$0 up to \$40,496 when leak detection and emissions testing is required. Any costs to state or other governmental agencies will be minimal and will be absorbed by existing resources.

The time period between the publication of this notice and the scheduled hearing constitutes a 60-day public comment period for the purpose of receiving written public comments on the proposed regulatory action. All interested parties may submit written comments prior to 5 p.m. on the day of the hearing to Miles Stotts, Kansas Department of Health and Environment, Bureau of Air, 1000 S.W. Jackson, Suite 310, Topeka, 66612, by fax to (785) 296-7455, or by e-mail to mstotts@kdheks.gov. All interested parties will be given a reasonable opportunity to present their views orally on the proposed regulatory action during the hearing. In order to give all parties an opportunity to present their views, it may be necessary to require each participant to limit any oral presentation to five minutes.

Copies of the proposed regulation and complete economic impact and environmental benefit statement may be obtained from the KDHE Bureau of Air by contacting Miles Stotts at (785) 296-1615 or mstotts@kdheks.gov. Copies also may be viewed at the following locations:

- Department of Air Quality, Unified Government of Wyandotte County - Kansas City, Kansas Health Department, 619 Ann Ave., Kansas City, Kansas
- Johnson County Environmental Department, 11811 S. Sunset, Suite 2700, Olathe
- Curtis State Office Building, 1000 S.W. Jackson, Suite 310, Topeka
- KDHE Northeast District Office, 800 W. 24th St., Lawrence
- KDHE Northwest District Office, 2301 E. 13th St., Hays
- KDHE North Central District Office, 2501 Market Place, Suite D, Salina
- KDHE South Central District Office, 130 S. Market, Suite 6050, Wichita
- KDHE Southeast District Office, 1500 W. 7th St., Chanute
- KDHE Southwest District Office, 302 W. McArtor Road, Dodge City
- Wichita-Sedgwick County Dept. of Community Health, 1900 E. 9th St., Wichita

The material also is available on the Bureau of Air's Web site at http://www.kdheks.gov/bar/public_notice.html. Questions pertaining to this proposed regulation should be directed to Miles Stotts.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulation and the economic impact and environmental benefit statement in an accessible format. Requests for accommodation should be made at least five working days in advance of the hearing by contacting Miles Stotts.

Roderick L. Bremby
Secretary of Health
and Environment

Doc. No. 038648

Attachment 2

SIGN-IN SHEET

Public Hearing - October 26, 2010

11:00 A.M., Room 530, Curtis State Office Building, Topeka, Kansas

Proposed New Regulation	Name of Regulation
K.A.R. 28-19-325	Compressed air energy storage.

Name (please print)	Representing	Address	Verbal and/or Written Testimony?
1. Keith Weber	KDHE		No
2. Susan Vogel	KDHE		—
3. Miles Stott	KDHE		yes
4. David Stott	Hearing Officer		
5. Shari Albrecht	KDHE		No
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			

Attachment 3

Testimony for Public Hearing on Administrative Rules and Regulations

K.A.R. 28-19-325: Compressed Air Energy Storage

October 26, 2010

Miles Stotts, Bureau of Air, Kansas Department of Health and Environment

Good morning, Mr. Stott. I am Miles Stotts with the Bureau of Air at KDHE. The proposed regulations we are discussing today address Compressed Air Energy Storage facilities.

The Compressed Air Energy Storage Act (CAES Act) was enacted by the 2009 Kansas Legislature at K.S.A. 66-1272 through 66-1279. Specifically, K.S.A. 66-1275 requires KDHE to create rules and regulations establishing requirements, procedures and standards for the monitoring of air emissions from compressed air energy storage (CAES) wells and storage facilities within 18 months after the effective date of the CAES Act.

Pursuant to the Compressed Air Energy Storage Act, KDHE is proposing a new CAES regulation that encompasses the following:

- Applicability of existing air permitting regulations to a CAES facility;
- Requirement to conduct a site emissions characterization, including a determination of volatile organic compounds and hazardous air pollutants that may be in the storage formation that may be emitted as a result of CAES operations;
- Annual emissions testing and reporting requirements; and
- Quarterly leak detection inspections.

The proposed regulation covers only the air emissions coming from compressed air energy storage wells and storage facilities to ensure that the wells and facilities comply with the Kansas Air Quality Act. So far, one comment email has been received from the Kansas Association of Counties, concerning the renewal process for Title V permits at the county level.

There are currently no existing CAES facilities in Kansas; one is built and operating in Germany, another is located in Hutsdorf, Alabama. The estimated initial compliance costs incurred by the owner or operator of a CAES facility may vary between \$28,400 and \$118,400, with annual compliance costs varying from \$0 up to \$40,496 when leak detection and emissions testing is required. Any costs to state or other governmental agencies will be minimal and will be absorbed by existing resources. Since there are currently no existing CAES facilities in Kansas, it is unknown if emissions controls will be necessary, as there is no prior experience with CAES emissions from which to draw information. Accordingly, there is no estimate of emissions control costs at this time.

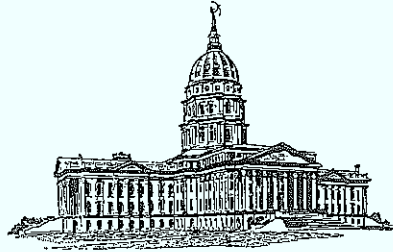
The department has worked very closely in development of these regulations with the Kansas Corporation Commission to ensure a common understanding of how a proposed CAES facility would be reviewed under the permitting process and evaluated during operations. A draft agreement to outline implementation of both their and our proposed regulations is under review.

The department has provided copies of these proposed amendments and the Regulatory Impact Statement to the League of Kansas Municipalities, the Kansas Association of Counties, and the Kansas Association of School Boards. We also provided a copy of these rules to the US EPA. The public hearing on these regulations is set for October 26, 2010. That concludes my testimony. Thank you.

Attachment 4

STATE OF KANSAS

ALAN D. CONROY
Director
RANEY L. GILLILAND
Assistant Director for Research
J.G. SCOTT
Chief Fiscal Analyst



STAFF
LEGISLATIVE COORDINATING COUNCIL
INTERIM COMMITTEES
STANDING COMMITTEES
LEGISLATIVE INQUIRIES

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

Room 68-West — State Capitol Building — 300 SW Tenth Avenue — Topeka, Kansas 66612-1504
PHONE (785) 296-3181 ♦ FAX (785) 296-3824 ♦ TTY (785) 296-3677
INTERNET: <http://www.kslegislature.org/kldr> E-MAIL: kslegres@kldr.ks.gov

September 24, 2010

Mr. Roderick Bremby, Secretary
Kansas Department of Health and Environment
1000 SW Jackson, Suite 540
Building Mail

RECEIVED
SEP 23 2010
SECRETARY OF
DEPT. HEALTH & ENVIRONMENT

Dear Secretary Bremby:

At its meeting on September 20, 2010, the Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning compressed air energy storage. After discussion, the Committee had the following comments.

- KAR 28-19-325. Since the history section refers to the Kansas Air Quality Act, KSA 65-3002 *et seq.*, the Committee suggests the agency identify the air contaminant or air pollutant being regulated. In addition, on page 4 in paragraph (e)(1), since the vapor leak detection method adopted by reference in KAR 28-19-720 is at best a 2006 vintage, please clarify whether the Secretary will utilize 2006 standards to measure the efficacy of the equivalency of the alternate method referred to in the regulation. Finally, on page 6 in subsection (3)(a) of the Economic Impact Statement, there is a reference to a potential permit fee of \$4,000, if needed, pursuant to KAR 28-19-304. KAR 28-19-304 speaks in terms of a non-refundable fee of no more than \$4,000. As a result, please consider whether the language needs to be modified from the non-refundable fee. Also, consider what additional regulations may need to be amended to be consistent with this regulation.

Prior to filing with the Secretary of State, review the history sections of the rules and regulations to update them to the most recent statutory citations, making certain the citations for authorizing and implementing statutes are correct and complete. Please indicate your agency's website address in the filing notice where proposed regulations can be located. In addition, if your agency accepts written comments by e-mail include this information in the public notice. Further, e-mail requests for public accommodation should be included as a part of the notice. Finally, verify that the adoption by reference of any materials included in the regulations is properly completed as prescribed in the *Policy and Procedure Manual for the Adoption of Kansas Administrative Regulations*.


Please make this letter a part of the public record on these regulations. The Committee will review the regulations which the agency ultimately adopts, and reserves any expression of legislative concern to that review.

To assist in that final review:

- Please inform the Joint Committee and me, in writing, at the time the rules and regulations are adopted and filed with the Secretary of State, of any and all changes which have been made following the public hearing.
- Please notify the Joint Committee and me, in writing, when your agency has adopted the regulations as permanent; delayed implementation of the regulations; or decided not to adopt any of the regulations.
- Also, please indicate separately to the Joint Committee and me, any changes made to the proposed regulations reviewed by the Committee.

Based upon direction from the Committee, failure to respond to each and every comment contained in this letter may result in the request that a spokesperson from your agency appear before the Committee to explain the agency's failure to reply.

Sincerely,



Raney L. Gilliland
Assistant Director for Research

RLG/jl

Attachment 5

ATTACHMENT TO THE REPORT OF THE HEARING OFFICER

K.A.R. 28-19-325

Final New Regulation

Legal Authorities

Kansas Statutes Annotated (K.S.A.) 65-3005, as amended, authorizes and directs the secretary to adopt such rules and regulations as necessary to enable the secretary to carry out the purpose and provisions of the Kansas Air Quality Act, K.S.A. 65-3001 *et seq.* and amendments thereto.

Responsiveness Summary

On October 26, 2010, a public hearing was held at 10:00 a.m. in Room 530 of the Curtis State Office Building in Topeka, Kansas. The purpose of the hearing was to consider the adoption of new permanent air quality regulation K.A.R. 28-19-325, Compressed Air Energy Storage.

The public comment period began with the publication of the Notice of Hearing on Proposed Administrative Regulations in the *Kansas Register* on August 26, 2010, and ended on October 26, 2010. The only comments received during this time were from Raney L. Gilliland, who submitted a letter on behalf of the Joint Committee on Administrative Rules and Regulations.

- The Joint Committee on Administrative Rules and Regulations (JCARR) considered the proposed regulation at its meeting on September 20, 2010. KDHE received a comment letter from JCARR on September 28, 2010, which can be found in Attachment 4 to the Report of the Hearing Officer. JCARR's comments and KDHE's responses follow.

Comment: "Since the history section refers to the Kansas Air Quality Act, KSA 65-3002 *et seq.*, the Committee suggests the agency identify the air contaminant or air pollutant being regulated."

Response: Numerous and varied air contaminants or air pollutants could be present at any given location of a compressed air storage facility. K.A.R. 28-19-325(b) requires specific action by an owner/operator if the construction, modification or operation of a CAES facility will result in a potential-to-emit equaling or exceeding the thresholds at K.A.R. 28-19-300. These referenced thresholds at K.A.R. 28-19-300 identify specific air pollutants and potential-to-emit values.

Action: No change was made to the proposed regulation as a result of these comments.

Comment: "In addition, on page 4 in paragraph (e)(1), since the vapor leak detection method adopted by reference in KAR 28-19-720 is at best a 2006 vintage, please clarify whether the

Secretary will utilize 2006 standards to measure the efficacy of the equivalency of the alternate method referred to in the regulation.”

Response: The vapor leak detection test method specified at K.A.R. 28-19-325(e)(1) must be done according to:

- 40 C.F.R. Part 60, Appendix A, Method 21 (which is adopted by reference in K.A.R. 28-19-720); or,
- An alternate method as demonstrated to be equivalent to the satisfaction of the Secretary of KDHE.

From time to time, KDHE revises its regulations that adopt by reference certain federal regulations. These revisions are done to update the adoption-by-reference date of the corresponding federal regulations in order to keep Kansas’ regulations current to federal regulations. Effective November 5, 2010, the adoption-by-reference date of 40 C.F.R. Part 60 into K.A.R. 28-19-720 was updated to July 1, 2008. Therefore, it is anticipated that the equivalency of a leak detection test method would be judged based on the standards and technology available on the date of the adoption-by-reference of 40 C.F.R. Part 60 in K.A.R. 28-19-720, which is currently July 1, 2008.

Action: No change was made to the proposed regulation as a result of these comments.

Comment: “Finally, on page 6 in subsection (3)(a) of the Economic Impact Statement, there is a reference to a potential permit fee of \$4,000, if needed, pursuant to KAR 28-19-304. KAR 28-19-304 speaks in terms of a non-refundable fee of no more than \$4,000. As a result, please consider whether the language needs to be modified from the non-refundable fee.”

Response: The nonrefundable fee that is outlined at K.A.R. 28-19-304 is contingent upon a facility being classified as an “emissions unit” or “stationary source”.

- K.A.R. 28-19-200(iii) defines a “stationary source” or “source” as any building, structure, facility, or installation that emits or may emit any air pollutant subject to any emission limitation or standard or that is required to obtain a permit pursuant to the Kansas air quality regulations.
- K.A.R. 28-19-200(y) defines “emission unit” as any part or activity of a stationary source that emits or would have the potential-to-emit any regulated pollutant or any pollutant listed under 42 U.S.C. § 7412(b) of the federal clean air act.

The Bureau of Air permitting staff routinely meets with prospective air permit applicants to determine the applicability of potential permitting fees. Therefore, if a proposed CAES facility’s potential to emit would fall below the emissions thresholds, limitations, or standards specified in K.A.R. 28-19-300, an air quality permit would not be necessary, and the facility would not have to submit the \$4,000 fee established by K.A.R. 28-19-304.

Action: No change was made to the proposed regulation as a result of these comments.

Comment: “Also, consider what additional regulations may need to be amended to be consistent with this regulation.”

Response: KDHE has carefully considered the impacts of K.A.R. 28-19-325 on existing regulations, and other regulations’ impacts on K.A.R. 28-19-325. For example, the Bureau of Air evaluated the construction permit regulations (K.A.R. 28-19-300 through K.A.R. 28-19-350), as well as the operating permit regulations (K.A.R. 28-19-500 through K.A.R. 28-19-564). The Bureau of Air worked closely with the Kansas Corporation Commission (KCC) and the KDHE Bureau of Water to ensure this regulation would harmonize with the KCC’s forthcoming regulations adopted pursuant to the Compressed Air Energy Storage Act. KDHE has not found any inconsistencies as a result of the adoption of this regulation. However, if any unforeseen issues arise in the future, KDHE will work to correct the matter.

Action: No change was made to the proposed regulation as a result of these comments.